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SUPREME COURT, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. _____

SHELDON LOVELACE, Petitioner

vs.

ACME MARKETS, INC. Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Third Circuit erred in construing Rule 4(a) and (j), Federal Rules of Civil Procedure, contrary to the intent of the sponsors of the amendment to Rule 4, and contrary to the spirit of Rule 1, in holding that the fraud of an independent process server in lying as to service being made did not constitute "good cause" so as to excuse late service made after the period authorized by Rule 4(j), and dismissing the suit, which had the effect of barring suit, since the statute of limitations might thereby prevent any recovery in a second suit.

** The parties are: Petitioner, Sheldon Lovelace, and Respondent, Acme Markets, Inc.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Opinion of the Court of Appeals is reported at 820 F.2d 81 (3rd Cir. 1987). A copy of said Opinion, and the Order denying reconsideration, and the Opinion and Order denying Reconsideration by the District Court are contained in the Appendix., at A-1 through A-20.

JURISDICTION

a) The date of the judgment sought to be reviewed is July 13, 1987, the denial of the petition for rehearing.

b) This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS WHICH THE CASE INVOLVES

Rule 4(a) of the Federal Rules of Civil Procedure provides:

> "(a) Summons: Issuance. Upon filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint."

Rule 4(j) of the Federal Rules of Civil Procedure provides:

> "(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion."

Rule 29 of the Rules for the United States District Court for the Eastern District of Pennsylvania, provides:

"Rule 29. Special Appointment for Service of Process.

When a party files a motion with the Clerk for special appointment of a named person, other than the United States Marshal or his deputy, to serve process pursuant to FR Civ P 4(c), accompanied by the representation of counsel that

(1) the named individual is or would be competent and not less than eighteen (18) years of age;

(2) the named individual is not and will not be a party to the action; and

(3) approval of the motion will effect substantial savings in (e.g. time, travel fees of the United States Marshal); the Clerk shall grant such motion specially appointing the named individual to serve process.

It is the responsibility of counsel to insure that a proper return of service is filed, pursuant to FR Civ P 4(g)."

STATEMENT OF THE CASE

This is a case under 42 U.S.C. § 2000e, race discrimination, by Petitioner, Sheldon Lovelace, a black male, against Respondent, Acme Markets, Inc., who formerly employed Petitioner as a retail clerk. Petitioner sued under said Civil Rights claim for his discharge, based upon his race.

On August 1, 1985, the Equal Employment Opportunity Commission sent Petitioner the Notice of Right to Sue. Suit was instituted on October 29, 1985, within the ninety (90) day period in which suit can be brought.

On that same day of October 29, 1985, counsel engaged a reputable process server,[1] an independent contractor, to make service of process, the summons and complaint, on the Respondent, Acme Markets, Inc. Said process server received the necessary papers for service, and was furnished with the correct address at which to make service,

and was instructed to promptly make service.

The process server reported to counsel that service had been made, and requested payment for said service, which was paid.

When no attorney had entered an appearance for the Respondent Plaintiff's counsel questioned the process server who reiterated that service had been made, and that proof of service would be forthcoming.

In fact, service was not made within the 120 day period set by Rule 4(j).

By letter of April 1, 1986, the District Court granted an extension of time until April 15, 1986, to effectuate service. Although counsel requested that he be specially appointed to make service, the Court failed to appoint him. Counsel then advised the process server of the time limit in the

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1. Said process server was specially appointed to make service by an Order issued by the Clerk of Court, pursuant to Rule 29 of the United States District Court for the Eastern District of Pennsylvania.

letter of the Court, and the process server agreed that he would make service on or before that date.

The process server did not make service by that date, but did make service on April 23, 1986, eight days after the date specified in the letter of the Court.

Upon motion of the Respondent, the District Court dismissed the Complaint, without prejudice, for failure to comply with Rule 4(j), Federal Rules of Civil Procedure, holding that "while the conduct of the service agency . . . is inexcusable, nevertheless the ultimate responsibility to ensure that service is properly and timely made rests with the plaintiff and his counsel. . . . Counsel's reliance on the representation of the service agency does not establish good cause." P. 4 of District Court Opinion, Appendix p. A-19(Emphasis added).

The Court of Appeals for the Third Circuit affirmed, holding that plaintiff and

his counsel had to "ensure timely service of process" under Rule 4(a), calling the "reliance upon the word of the specially appointed process server", "misplaced", and calling the effort to effectuate service as not constituting "diligent efforts to ensure timely service of process." Court of Appeals Opinion at pp. 6, 7, and 8, Appendix pp. A-8-10.

A timely petition for rehearing and rehearing en banc was denied, with the notation that Judge Becker "would grant rehearing in banc." Appendix p. A-1-2.

JURISDICTION OF THE DISTRICT COURT

The United States District Court for the Eastern District of Pennsylvania had jurisdiction of the case under 42 U.S.C. § 2000e et seq. (Civil Rights) and 28 U.S.C. § 1331 (Federal Question), and pendent jurisdiction over the related state claims.

ARGUMENT

I. THE DISTRICT COURT AND THE COURT OF APPEALS CONSTRUED RULE 4(a) AND 4(j), FEDERAL RULES OF CIVIL PROCEDURE, IN A MANNER INCONSISTENT WITH THE PURPOSE OF RULE 4(a) AND 4(j), BY HOLDING THAT THE FRAUD OF THE PROCESS SERVER DID NOT CONSTITUTE "GOOD CAUSE" UNDER RULE 4(j), SO AS TO EXCUSE LATE SERVICE WITHOUT THE STRICT TIME LIMITS AUTHORIZED UNDER RULE 4(j).

The purpose for the amendment of Rule 4, Federal Rules of Civil Procedure, concerning service of process, and the time limits on service contained in Rule 4(j) of the Federal Rules of Civil Procedure, as promulgated by this Honorable Court,[2] are contained in 1982 U.S. Code Congressional and

2. 28 U.S.C. § 2072 provides, in pertinent part, as follows:

Admin News, at pp. 4434 through 4448. As the discussion therein points out, the prime purpose of the amendments was to get the marshal out of the service business in private lawsuits in the federal courts.[3]

The 120 day time limit was inserted to prevent a party from merely filing suit and failing to take steps to effectuate service, with "good cause" allowed as an excuse, as a device, for relief when service could not be effectuated within the time limit.[4]

The authoritative commentators on the construction of the amended Rule 4(j)

2.(Cont.)

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals in the United States in civil actions . . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

3. See 1982 U.S. Code Congressional and Admin.

endorsed the position that what was required of plaintiff and counsel was "reasonable efforts to effectuate service," and if such was done, suggested that the time deadline "can be extended or its being missed excused."[5]

The Third Circuit Court of Appeals narrowly interpreted the concept of "good cause", as stated at pp. 6-7 of the Slip

3.(Cont.) News, pp. 4437-4440 (House Report), pp. 4435, 4447 (letter of Robert McConnell, Assistant Attorney General, to the Honorable Peter Rodino, Chairman of the Judiciary Committee of the House of Representatives.

4. While the House Report has some discussion of the problem of a dismissal without prejudice being, in fact one with prejudice where a statute of limitations may have passed, the question of a tolling of a statute of limitations was not at all resolved. See 1982 U.S. Code Congressional and Administrative News, pp. 4434-4448.

5. See David Siegel, Practice Commentaries on F.R.C.P. Rule 4, contained in the Supplementary Pamphlet to Title 28 F.R.C.P. Rules 1 to 11, of United States Code Annotated (West Publishing Co. 1987), pp 58-59, 91. (Hereinafter referred to as Siegel) Siegel also published an extensive article at 96 F.R.D. 88, 109-113, "Effects of a Private Process Server's Omission or Wrongdoing", discussing the issues involved in

Opinion, noting only the example of "when the defendant intentionally evades service of process. . . ." Appendix pp.A-8-9.Siegel, supra, in his commentary, specifically discusses the question, stating:

> "In order . . . to have service made after its expiration accepted, subdivision (j) requires the plaintiff to show 'good cause'. What 'good cause' is is neither defined nor even guided, an unfortunate omission, due, perhaps, to the drafters' failure to appreciate the import of the issue. The defendant's 'evasion' of service is cited in the 1983 legislative notes (footnote 24) as 'good cause' for a time extension, but as an example it is too obvious to be helpful on subdivision (j) generally.
>
> The legislative notes do indicate that if the plaintiff has made 'reasonble' efforts to effectuate service the court will 'undoubtedly' grant the time extension . . . ." (Emphasis added). Siegel, supra, at p. 58.

This salutary rule has been followed by many of the courts which have been called

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5. (Cont.) detail.

Siegel, supra, noted no rational distinction between an advance request for an extension under Rule 6(b), FRCP, or excusing a past failure under Rule 4(j). Siegel, supra, at p. 91. Accord, Moorehead v. Miller, 102 F.R.D. 834 (D. V.I. 1984); Shuster v.

on to determine whether "good cause" exists to excuse delay in service. See Moorehead v. Miller, 102 F.R.D. 834 (D. V.I. 1984)(Plaintiff misled by Clerk of Court as to status of service); FDIC v. Sims, 100 F.R.D. 792 (N.D. Ala. 1984)(A "bona fide" effort to effectuate service is "good cause"); Geller v. Newell, 602 F. Supp. 501 (S.D. N.Y. 1984) (Ineffectual service attempted, and effort to effectuate service after learning first effort invalid, constituted "good cause"); Arroyo v. Wheat, 102 F.R.D. 516 (D. Nev. 1984)(Attempted service by mail within 120 day period, which was ineffectual, constitutes "good cause" to extend time for service); Prather v. Raymond Constr. Co., 570 F.Supp. 278 (N.D. Ga. 1983)(Defendant's refusal to acknowledge service by mail constitutes "good cause"); United States v. Cozza, Inc., 106 F.R.D. 264 (S.D. N.Y. 1985)(Delivery of process to marshal for service and marshal

delays service is "good cause"); LaBruno v. Fauver, 109 F.R.D. 43 (D. N.J. 1985)(Same as Cozza, Inc., supra); see also Woods v. Partenreederei M.S. Yankee Clipper, 112 F.R.D. 115 (D. Mass. 1986)("Good cause" shown where error in making service on wrong agent was "reasonable"); Ditkof v. Owen-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987)("Good cause" shown where plaintiff is "understandably lulled . . . into believing that service had been accomplished . . . ."). Cf. Board of Education v. Aetna Cas. & Surety Co., 48 F.R.D. 402 (S.D. N.Y. 1969); LeMaster v. City of Winnemucca, 113 F.R.D. 37 (D. Nev. 1986)(Attorney suffering from cancer was able to work part-time; Court held that it had to "look at . . . (the attorney's) entire caseload and not just his responsibilities in this case . . . (and would not) 'weigh with a jeweler's precision' the . . . pressures on counsel against the few days of

grace at stake herein . . . .").

In LaBruno v. Fauver, supra, the court stated:

> "Plaintiff appears to have taken the steps which he might reasonably expect to have been appropriate in order to provide for the issuance and service of that 1983 summons." 109 F.R.D. at 44.

The case relied on by the Third Circuit Court of Appeals in the instant case, United States for Use of DeLoss v. Kenner General Contractors, Inc., 764 F.2d 707 (9th Cir. 1985), utilized the term "half-hearted" to characterize facts where counsel therein merely made one telephone call in an effort to ascertain the address of the defendant, but never placed the papers in anyone's hands for service, or took any other steps to effectuate service.[6]

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6. In those cases where the courts have granted Rule 4(j) dismissals, counsel has not acted to effectuate service, whether by reasons pertaining to tactics, lack of knowledge of Rule 4(j), or neglect or inadvertence. Indeed, in those cases,

Siegel goes on to state the precise question involved herein, as follows:

> "Can an omission of a process server qualify as 'good cause'--given the virtual agency now spelled out between plaintiff and process server by subdivision (a)--to earn the plaintiff an extension of the 120 days? . . . .
>
> One ought to be able to assume that there is no irrevocable marriage of plaintiff and process server under subdivision (a) such that there can't be a separation decree issued under subdivision (j), preserving a merit-

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6. (Cont.) papers were never placed in the hands of a process server with instructions to serve the papers, but, rather remanded with counsel. See, e.g., Burks v. Griffith, 100 F.R.D. 491 (N.D. N.Y. 1984) (No explanation for delay); Sanders v. Marshall, 100 F.R.D. 480 (W.D. Pa. 1984) (No explanation); Norlock v. City of Garland, 768 F.2d 654 (5th Cir. 1985) (No explanation); Redding v. Essex Crane Rental Corp., 752 F.2d 1077 (5th Cir. 1985)(Intentional delay of service and repeated warnings to counsel; tactical advantage sought in related state case); Coleman v. Greyhound Lines, Inc., 100 F.R.D. 476 (N.D. Ill. 1984)(Inadvertence of counsel is not "good cause"); Edwards v. Edwards, 754 F.2d 298 (8th Cir. 1985) (170 days and despite warning counsel took no steps to effectuate service); Townsel v. Contra Costa County, 820 F.2d 319 (9th Cir. 1987)(Counsel's lack of knowledge of Rule 4(j) and its provisions is not "good cause"); Hart v. United States, 817 F.2d 78 (9th Cir. 1987)(Dismissal sustained where counsel advised of

orious action. . . ." Siegel, supra, at p. 28. See also Siegel, supra, at p. 59. (Emphasis added).

In the instant case, the decision of the Court of Appeals, and the District Court, rests wholly on the premises that Petitioner and his counsel, by virtue of Rule 4(a) and (j), are wedded to the process server and responsible for his delicts, and that the fraudulent and faithless conduct of the process server, an independent contractor, cannot constitute "good cause" under Rule 4(j), FRCP.

This Honorable Court Should Grant Review.

This Honorable Court promulgated Rule 4(a) and (j), FRCP, and has the final

6.(Cont.) deficiency prior to running of 120 day period, with sufficient time to correct and no step taken to correct deficiency); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985)(Service of process in related state suit does not excuse failure to serve).

Indeed, only the Court of Appeals for the Third Circuit in Braxton v. United States, No. 86-1504, 3rd Cir. 1987,

authority as to the correct interpretation and application of Rule 4(a) and (j). See 28 U.S.C. § 2072.

The rules adopted may not abridge the rights of the litigants. United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). If the fraud of the process server is not "good cause" under Rule 4(j), FRCP, and if Rule 4(a) is viewed, in conjunction with Rule 4(j), as creating a new species of vicarious responsibility or agency responsibility of a peculiar nature, which is not sanctioned by state law concepts of agency or for purposes of federal law in other contexts,[7] then the

6. (Cont.)817 F.2d 238, has held that the failure of a process server to make service is not "good cause" excusing delay under Rule 4(j), FRCP. In Braxton the process server promised service would be timely made, but did not make timely service. In the instant case the process server falsely stated that service had been made when it had not. Braxton goes further in denying "good cause" than any other reported case of which counsel is aware.

right of Petitioner, Sheldon Lovelace, to have his Civil Right claim heard and adjudicated on the merits is "abridged," within the meaning of 28 U.S.C. § 2072.

The rigid, mechanical interpretation of Rule 4(a) and (j), FRCP, made by the Court of Appeals and the District Court in the instant case, creates a new type of agency especially for Rule 4(a) and (j), FRCP, which does not exist elsewhere in the law. The interpretation placed on Rule 4(a) and (j) by the United States Court of Appeals for the Third Circuit and the District Court is at variance with the case law as decided by the various district courts, and goes beyond any decision made by any other Court of Appeals in applying Rule 4(a) and (j).

In an area of uncharted waters concern-

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7. An independent contractor is employed to do certain work for which he retains control over the means of doing the work,

ing Rule 4(a) and (j), FRCP, the Court of Appeals for the Third Circuit ignored the discussion of the learned commentator, David Siegel, on the precise point in question, and, instead, performed a purely mechanical function, without analysis, and without perspective, or even consideration of the purpose of the Rule.[8]

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7. (Cont.) and contracts to provide a result. See C.J.S., Agency, § 12; Feinman v. A.H. Bull S.S. Co., 107 F. Supp. 153 (D. Pa. 1952), aff'd, 216 F.2d 393 (3rd Cir.); Adriatic Ship Supply Co., Inc. v. M/V Shaula, 632 F. Supp. 1573 (E.D. Pa. 1986); Massachusetts Mutual Life Ins.Co. v. Central Penn Nat. Bank, 372 F.Supp. 1027 (E.D. Pa. 1974), aff'd, 510 F.2d 969, 970 (3rd Cir.).

8. See Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984), where the Second Circuit Court of Appeals made a "special construction" of Rule 4(c) in order to save a suit, where justice clearly required such result. See Siegel, supra, at pp. 91-92. The Third Circuit disagreed with the Second Circuit. Green v. Humphrey Elevator & Truck Co., 816 F.2d 877 (3rd Cir. 1987)(Construes 4(c)(2)(C)(ii) and (j), FRCP. Court indicates that "excusable neglect" may be "good cause" at 816 F.2d 884).

Siegel also raised this question in terms of the intent of the drafters of the Amendment to Rule 4, FRCP, stating:

> "A more subtle and therefor more insidious problem for the plaintiff under the 'good cause' requirement of subdivision (j) is lilely to be the effect of the provision of subdivision (a) that makes the plaintiff 'responsible for prompt service.' This aspect of subdivision (a) is also a 1983 product. Does it mean that the tardiness or omission, or even dishonesty, of the process server, resulting in late service, if at all, is to be deemed the plaintiff's fault? Is the plaintiff's responsibility on this score to be such that the process server's actions can never be 'cause' for a subdivision (j) time extension? If so, then subdivisions (a) and (j) between them will make more trouble than any of the 1983 amendment's sponsors envisioned." (Emphasis added). Siegel, supra, at p. 58.

The interpretation of Rule 4(a) and (j), FRCP, by the Third Circuit in the instant case is clearly at odds with the intent of the sponsors of the amendment as stated by Siegel, supra.

This Honorable Court should restore that intent, in accepting this Petition for

Certiorari, and granting the relief requested.

The application of Rule 4(a) and (j), FRCP, has ongoing importance to all persons who may become litigants in the Federal Courts. Its effect, if the Third Circuit interpretation is adopted, would be to promote litigation over service, and to limit the ability of some litigants, because of delay or fraud by process servers, to have their cases determined on the merits. The harsh, niggardly, and overly technical interpretation of Rule 4(a) and (j) made by the Third Circuit Court of Appeals is clearly contrary to Rule 1, FRCP, which states, in pertinent part:

> "These rules . . . shall be construed to secure the just, speedy and inexpensive determination of every action." (Emphasis added).

Indeed, this Honorable Court has stated that the purpose of the Rules is to ad-

minister justice through fair trials, not through summary dismissals. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966); accord, Hartley & Parker, Inc. v. Florida Beverage Corp., 348 F.2d 161 (5th Cir. 1965)(The spirit of federal practice is to accord substantial justice over mere technical contention).

Finally, the Court of Appeals for the Third Circuit acknowledged that its action in affirming dismissal of the suit for failure to effectuate service within the time authorized by Rule 4(j), FRCP, was harsh, stating:

> "This lack of diligence and inadvertence to the running of the 120 day period, even when dismissal under Fed.R.Civ.P.4(j) could spell the end of Lovelace's cause of action, cannot be excused if the legislative intent for a strict interpretation of Fed.R.Civ.P.4(j) is to be followed and the requirement of Fed.R.Civ.P. 4(a) is not to be rendered illusory. See Braxton v. United States, No. 86-1504, slip. op. (3d Cir. April 29, 1987).

IV

We recognize that Lovelace may well be harmed by this determination. . . ." Slip Opinion at p. 8, Appendix p.A-10.

Accordingly, Petitioner, Sheldon Lovelace, was denied his substantial rights to have his suit for Civil Rights violation under 42 U.S.C. § 2000e heard and determined on the merits, by virtue of the dismissal of the suit for failure to make service within the time limits authorized under Rule 4(a) and (j), FRCP, where he had established "good cause" for the said failure, the fraud of the process server. The Court of Appeals and the District Court erred in determining that Rule 4(a) and (j), FRCP, required a "strict interpretation", which interpretation was clearly at odds with the intent of the sponsors of the amendment of Rule 4(j), and with Rule 1, FRCP, and which "abridges" Petitioner's right under

28 U.S.C. § 2072.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari on the question of Petitioner's showing of "good cause" to excuse late service under Rule 4(j), where the Court of Appeals interpreted Rule 4(a) and (j), FRCP, in a manner inconsistent with the intent of the amendment's sponsors, and inconsistently with the spirit of the Federal Rules as stated in Rule 1, to provide for the "just" determination of "every" case.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 1987, three true and correct copies of the Petition for Writ of Certiorari were served by depositing the same with the United States Post Office, First Class Mail, Postage Prepaid, addressed to Respondent's attorney of record, Herbert G. Keene, Jr., Esquire, Stradley, Ronon, Stevens & Young, 1100 One Franklin Plaza, Philadelphia, Pennsylvania 19102.

I further certify that all parties required to be served have been served.

Harvey L. Anderson

HARVEY LEE ANDERSON
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1690

SHELDON LOVELACE,
Appellant

v.

ACME MARKETS, INC.

(D.C. Civil No. 85-6229)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and GREENBERG, Circuit Judges, and McCUNE, District Judge*

The Petition for rehearing filed by appellant, Sheldon Lovelace in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

cont'd

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would grant rehearing in banc.

By the Court,

Chief Judge

DATED:

*Hon. Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1690

SHELDON LOVELACE,
Appellant

v.

ACME MARKETS, INC.

(D.C. Civil No. 85-6229)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Argued: May 14, 1987
Before: GIBBONS, *Chief Judge*,
MANSMANN, *Circuit Judge*
and MC CUNE, *District Judge*•

(Opinion Filed: May 29, 1987)

HARVEY L. ANDERSON, ESQ. (Argued)
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Philadelphia, PA 19107

Attorney for Appellant

•Hon. Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

HERBERT G. KEENE, JR., ESQ. (Argued)
STEPHEN C. BAKER, ESQ.
STRADLEY, RONON, STEVENS & YOUNG
1100 One Franklin Plaza
Philadelphia, PA 19102

Attorneys for Appellee

OPINION OF THE COURT

GIBBONS, *Chief Judge*:

This appeal presents a question concerning the interrelationship between Fed. R. Civ. P. 4(c)(2)(B)(iii) and the 120-day period permitted by Fed. R. Civ. P. 4(j) to effect service of process. We must determine whether the district court properly concluded that the plaintiff's reliance upon the representation of a specially-appointed process server, that service had been made on time, failed to establish good cause to excuse the plaintiff's failure to make service of process upon the defendant until 55 days after the 120-day time limit required by Fed. R. Civ. P. 4(j) had expired. We will affirm.

I.

In October, 1976, the plaintiff, Sheldon Lovelace, was hired as a cashier by the defendant, Acme Markets, Inc. (Acme). Lovelace, who is black, contends that throughout the course of his employment he was discriminated against on the basis of his race. He claims that on May 12, 1984 this discriminatory treatment culminated in his discharge.

On October 29, 1984, Lovelace filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in which he alleged

that Acme had discriminated against him on the basis of race. The EEOC issued a Notice of Right to Sue on August 1, 1985. On October 29, 1985 Lovelace filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging a violation of 42 U.S.C. § 2000e-2 (1982) and various pendent state claims.

Lovelace's counsel selected the Fed. R. Civ. P. 4(c)(2)(B)(iii) method for service of process and filed a Motion for Special Appointment to Serve Process designating Michael Damiano for the purpose of serving the summons and complaint upon Acme. The district court granted this motion on October 29, 1985 and Damiano was provided with all the necessary papers and directions for effective service of process upon Acme. On December 2, 1985, Lovelace's counsel received a bill from Damiano that represented that process had been served upon Acme.

On February 26, 1986, coincidentally the 120th day following the institution of the action, and as such the last day under Fed. R. Civ. P. 4(j) to effect timely service of process upon Acme, Lovelace's counsel sent a letter to Damiano requesting adequate proof of such service. Lovelace's counsel was told that the necessary proof would be forthcoming.

On April 1, 1986, Lovelace's counsel received a letter from the clerk for the district to which the case was assigned which stated, first, that the court had not yet received the affidavit of proof of service upon Acme required by Fed. R. Civ. P. 4(g) and, second, that unless Acme were served within 15 days from the date of the letter, the court would commence proceedings to dismiss the action.

Service of process was finally made upon Acme on April 23, 1986, eight days after the deadline set forth in the April 1 letter and 55 days after the deadline established by Fed. R. Civ. P. 4(j).

II.

Acme brought a motion to dismiss for failure to serve process within the 120-day period provided by Fed. R. Civ. P. 4(j) without good cause. Lovelace contended that the district court had good cause to excuse his failure to serve process within the 120-day period. To support that contention Lovelace alleged that he was misled by the representation of Damiano that process had been served on time when in fact it had not been.

The district court rejected Lovelace's contentions and granted Acme's motion to dismiss without prejudice.[1] The district court concluded that Lovelace did not demonstrate good cause to permit an extension of the 120-day limit. The court determined that Lovelace should have taken additional steps to ensure timely service of process since, under Fed. R. Civ. P. 4(a), the burden to ensure proper and timely service rested upon Lovelace and his attorney.

Lovelace subsequently brought a motion seeking to have the district court reconsider its determination. The dismissal of that motion led to this appeal.[2]

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[1]We recognize that should we affirm the determination of the district court, Lovelace may effectively be denied his day in court. His EEOC cause of action, to which his state claims are pendent, is subject to a 90-day time limit. Since the EEOC granted Lovelace a Notice of Right to Sue on August 1, 1985, it is arguable that a new suit upon that claim may be time-barred.

[2]Acme's contention that the district court's denial to reconsider its dismissal of Lovelace's complaint, without prejudice, is not an appealable order, is unfounded. A motion to reconsider is a motion to alter or amend under Fed. R. Civ. P. 59(e). Thus, the order of the district court denying the motion to reconsider is clearly subject to review on appeal. *See* Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 883 (9th Cir. 1983).

III.

The district court's determination that good cause had not been shown to justify an extension of the 120-day limit established by Fed. R. Civ. P. 4(j) will be affirmed unless it is clear that the district court abused its discretion. *See Fournier v. Textron, Inc.*, 776 F.2d 532, 534 (5th Cir. 1985); *Wei v. Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985); *Edwards v. Edwards*, 754 F.2d 298, 299 (8th Cir. 1985).

The 1983 amendments to Fed. R. Civ. P. 4 "were intended primarily to relieve United States marshals of the burden of serving summonses and complaints in private civil actions." 128 Cong. Rec. H9848, 9849 (daily ed. Dec. 15, 1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 4434, 4437. Thus, the general service of process rule, Fed. R. Civ. P. 4(c)(2)(A), requires that the "summons and complaint shall . . . be served by any person who is not a party and is not less than 18 years of age." Fed. R. Civ. P. 4(c)(2)(A). Service of the summons and complaint by United States marshals, their deputies, and specially-appointed process servers provided for in Fed. R. Civ. P. 4(c)(2)(B) is a limited exception to that general rule. While we do not believe that a specially-appointed process server was necessary in order that service be properly effected in this action,[3]

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[3]Fed. R. Civ. P. 4(c)(3) provides that courts are free to make special appointments to serve process. However, such an appointment can only be made, for the purposes of Fed. R. Civ. P. 4(c)(2)(B)(iii), when such appointment "is required . . . in order that service be properly effected in that particular action." Fed. R. Civ. P. 4(c)(2)(B)(iii). A situation in which such an appointment is required is where violence is anticipated. 128 Cong. Rec. H9848, 9851 n.19 (daily ed. Dec. 15, 1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 4434, 4443-44 n.19.

such a process server was appointed by the court and it was incumbent upon the plaintiff and his attorney to ensure timely service of process. *See* Fed. R. Civ. P. 4(a). The 120-day limit to effect service of process, established by Fed. R. Civ. P. 4(j) is to be strictly applied, and if service of the summons and the complaint is not made in time and the plaintiff fails to demonstrate good cause for the delay "the court *must* dismiss the action as to the unserved defendant." 128 Cong. Rec. H9848, 9850 (daily ed. Dec. 15, 1982) (emphasis added), *reprinted in* 1982 U.S. Code Cong. & Admin. News 4434, 4441. It was in accordance with the strict interpretation of the 120-day rule intended by its drafters that the district court concluded that good cause had not been shown to excuse the plaintiff's delay.

Legislative history provides only one example where an extension for good cause would be permissible -- specifically when the defendant intentionally evades service of process. 128 Cong. Rec. H9848, 9852 n.25 (daily ed. Dec. 15, 1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 4434, 4446 n.25.

"Half-hearted" efforts by counsel to effect service of process prior to the deadline do not necessarily excuse a delay, even when dismissal results in the plaintiff's

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The limited purpose to which the Fed. R. Civ. P. 4(c)(2)(B)(iii) method was intended to be used is further evidenced by the fact that there is no provision in the rule for an alternative method to serve process if the specially-appointed process server fails. The use of an alternative method is provided for should service by mail be unsuccessful. *See* Fed. R. Civ. P. 4(c)(2)(C)(ii). The absence of a similar proviso in Fed. R. Civ. P. 4(c)(2)(B)(iii) is, we believe, justified by the fact that Fed. R. Civ. P. 4(c)(2)(B)(iii) is intended to be an exception to the general rule for service of process and it is to be used only where it is *required* to effect service of process -- i.e., where the other methods provided for in Fed. R. Civ. P. 4 would prove insufficient and inadequate.

case being time-barred due to the fact that the statute of limitations on the plaintiff's cause of action has run. *See United States For Use of DeLoss v. Kenner General Contractors, Inc.*, 764 F.2d 707, 710 (9th Cir. 1985). Furthermore, when a delay is the result of inadvertance of counsel, it need not be excused. *See Wei*, 763 F.2d at 372. Similarly, when there is a lack of diligent effort to ensure timely service of process, an extension of the time for service may be refused. *See Coleman v. Greyhound Lines, Inc.*, 100 F.R.D. 476, 477-78 (N.D. Ill. 1984).

The strictly-applied time limit of Fed. R. Civ. P. 4(j) and the requirement of Fed. R. Civ. P. 6(a) that the plaintiff and his counsel ensure timely service of process combine to require that the plaintiff and his counsel be denied the luxury of sitting back and waiting until the 120-day period expires before ensuring that process has been served upon the defendant. When the 120-day period reaches its expiration and adequate proof of service of process has not been received, the plaintiff must take additional steps to ensure timely service of process, or, in the alternative, move under Fed. R. Civ. P. 6(b) for an enlargement of the time to effect service of process. *See* 128 Cong. Rec. H9848, 9851 (daily ed. Dec. 15, 1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 4434, 4442; 2 J. Moore, *Moore's Federal Practice* ¶ 4.46 (2d ed. 1986); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1138 (2d ed. Supp. 1985).

The misplaced reliance upon the word of the specially-appointed process server produced in the plaintiff and his counsel a belief that process had been served upon the defendant. Secure in that belief, plaintiff and his counsel inadvertently permitted the 120-day period to lapse despite the fact that they were not in possession of adequate proof of service of process upon the defendant. It cannot be said that the

acts of plaintiff and his counsel as the 120-day period reached its expiration constituted diligent efforts to ensure timely service of process. Alternative means to effect timely service of process were available, as was Fed. R. Civ. P. 6(b), if additional time to serve process was required. This lack of diligence and inadvertence to the running of the 120-day period, even when dismissal under Fed. R. Civ. P. 4(j) could spell the end of Lovelace's cause of action, cannot be excused if the legislative intent for a strict interpretation of Fed. R. Civ. P. 4(j) is to be followed and the requirement of Fed. R. Civ. P. 4(a) is not to be rendered illusory. *See Braxton v. United States*, No. 86-1504, slip op. (3d Cir. April 29, 1987).

IV.

We recognize that Lovelace may well be harmed by this determination, but we cannot conclude that the district court abused its discretion by refusing to excuse the 55-day delay under the circumstances presented. The order appealed from will therefore be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHELDON LOVELACE	:	CIVIL ACTION
	:	
V.	:	
	:	
ACME MARKETS, INC.	:	NO. 85-6229

ORDER

AND NOW, this 28th day of OCTOBER, 1986, upon consideration of plaintiff's Motion for Reconsideration, it is hereby

ORDERED that the motion be and the same is hereby DENIED.

It is further ORDERED that plaintiff's alternative request for relief from the running of the Statute of Limitations is DISMISSED, as premature, without prejudice to plaintiff's right to raise the issue upon the filing of a second complaint.

BY THE COURT:

JOSEPH L. MCGLYNN, JR. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHELDON LOVELACE	:	CIVIL ACTION
	:	
v.	:	
	:	
ACME MARKETS, INC.	:	NO. 85-6229

ORDER

AND NOW, this 19th day of SEPTEMBER, 1986, upon consideration of the Motion of Acme Markets, Inc. to Dismiss the Complaint, it is

ORDERED

that said Motion be and it is hereby GRANTED and the Complaint is DISMISSED without prejudice.

BY THE COURT:

_____
JOSEPH L. McGLYNN, JR. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHELDON LOVELACE	:	CIVIL ACTION
	:	
v.	:	
	:	
ACME MARKETS, INC.	:	
	:	NO. 85-6229

MEMORANDUM OF DECISION

MCGLYNN, J. SEPTEMBER 19, 1986

Presently before this court is a Motion of Acme Markets, Inc. (Acme) to Dismiss the Complaint of Sheldon Lovelace (Lovelace) pursuant to Federal Rule of Civil Procedure 4(j) for failure to make timely service of process. Acme asserts that Lovelace failed to make service of process within the 120 day time limit prescribed by F.R.C.P. 4(j) without good cause. For the reasons that follow, the motion to dismiss will be granted without prejudice.[1]

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[1]In its Answer to Acme's Motion to Dismiss, counsel for Lovelace argued that should the court dismiss the Complaint, the court must decide whether the statute of limitations is tolled from the time the Complaint was filed until the date of the Order dismissing the Complaint. The court declines to rule on this issue, since counsel for Acme did not have an opportunity to address the applicability

Lovelace filed a Complaint with this court on October 29, 1985. Counsel then retained a professional service agency to serve the Summons and a copy of the Complaint on Acme. The agency made service upon Acme on April 23, 1986,[2] approximately 176 days after the filing of the Complaint.

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1 cont'd its Motion to Dismiss, and the issue is properly raised if and when a second Complaint is filed.

[2]There is a discrepancy in the pleadings before the court concerning the date on which the process server actually served Acme. In its Motion to Dismiss, Acme fixes the service date at April 24, 1986, citing a Service of Process Transmittal Form from its registered agent, which is attached to its Motion to Dismiss as Exhibit "C." In its Answer, Lovelace fixes the service date at April 23, 1986, citing the Return of Service Form from the process server, which is attached to its Answer as Exhibit "8." For purposes of this opinion, and the service date is considered to be April 23, 1986.

F.R.C.P. 4(a) requires the plaintiff or the plaintiff's attorney to make prompt service of the Summons and a copy of the Complaint. In particular, F.R.C.P. 4(j) provides in part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion ....

The purpose underlying F.R.C.P. 4(j) is well established, namely "to encourage prompt movement of civil actions in federal courts." Phillip Brothers, Inc. v. M/V Merkur Bay, 110 F.R.D. 443, 444

(D. Del. 1986)(citing 2 Moore's Federal Practice ¶401[33.-31]). F.R.C.P. 4(j) creates an outer limit as to what constitutes timely service of process. See 2 Moore's Federal Practice ¶4.46 (1986). Moreover, the requirement of F.R.C.P. 4(j) that a complaint be dismissed without prejudice if service is made outside the 120 day time limit appears to be mandatory. Phillip Brothers, Inc., 110 F.R.D. at 444 (citing cases).

It is undisputed that Lovelace failed to meet the 120 day time limit imposed by F.R.C.P. 4(j). Thus, the issue becomes whether Lovelace has shown good cause for the failure to make timely service. The circumstances of this case do not support an adequate showing of good cause.

The good cause exception to F.R.C.P. 4(j) has been subject to little

judicial elaboration. Nonetheless, some boundaries have been identified. Evasion of service, for example, does constitute good cause. Phillip Brothers, Inc., 110 F.R.D. at 445. On the other hand, inadvertence or heedless nonservice, a belief that a settlement is imminent, or a desire to amend a complaint do not constitute good cause. Id. at 444-45. Absent a clear showing of good cause, most courts dismiss a complaint that is not timely served under F.R.C.P. 4(j). See, e.g., Edwards v. Edwards, 754 F.2d 298 (8th Cir. 1985)(per curiam); Burks v. Griffith, 100 F.R.D. 491 (N.D.N.Y. 1984).

In this case, Lovelace contends that good cause is established by three primary factors: reliance on a professional service agency, written and oral demands to the service agency to make service, and representations by the agency that service

had been completed when in fact it had not. While the conduct of the service agency as represented to the court is inexcusable, nevertheless, the ultimate responsibility to ensure that service is properly and timely made rests with the plaintiff and his counsel.

Several factors militate against a finding of good cause. First, Lovelace made service 55 days after the expiration of the 120 day time limit. Second, according to affidavits submitted to this court, as early as December 25, 1985, counsel for Lovelace requested, and did not receive proof of service from the service agency. Two months later, on February 29, 1986, counsel for Lovelace again requested, and again did not receive, proof of service. In light of these developments, counsel should have been alerted to the possibility that service

had not been made and, thus, he was obliged to take steps to ensure compliance with the rule. Counsel's reliance on the representations of the service agency does not establish good cause.

Finally, it should be noted that on April 1, 1986, the Clerk of Court notified Lovelace by letter of the requirements of F.R.C.P. 4(j) and the consequences of a failure to make timely service. The letter instructed counsel to make service within 15 days of the date of the letter. Lovelace made service upon Acme on April 23, 1986, eight days after the deadline set forth in the court's letter.

Accordingly, I find that there is no basis for a finding of good cause. The motion of the defendant to dismiss will be granted without prejudice.

COMMONWEALTH OF PENNSYLVANIA

SS

COUNTY OF PHILADELPHIA

AFFIDAVIT

I, Harvey L. Anderson, Esquire, being duly sworn according to law, do depose and state, as follows:

1. I am the Attorney for the Plaintiff, Sheldon Lovelace, in this cause of action, C.A. No. 85-6229.

2. That I ascertained that CT Corporation, 123 S. Broad Street, Philadelphia, Pennsylvania was the agent registered with the Commonwealth for service of process.

3. That at the time the instant suit was filed on October 29, 1985, I had engaged a reputable firm and individual, who is in the business of

providing service of process in Federal Court proceedings, where a public official is unavailable for said service. Said firm and individual are Professional Filing Service, Michael Damiano, P.O.Box 588, Drexel Hill, Pennsylvania 19026.

4. Pursuant to that purpose, I filed, with the papers initiating suit in this case, a Motion for Special Appointment to Serve Process designating Michael Damiano for that purpose. See Exhibit 2 to Plaintiff's Answer to Defendant's Motion.

5. A copy of the complaint and summons and all papers necessary for the accomplishment of service, and for the making of a return of service were given to Professional Filing Service, Michael Damiano, on or immediately after October 29, 1985, with instructions that service should be promptly made on the

said Defendant, Acme Market, Inc., at its registered office with the Commonwealth, c/o CT Corporation, 123 South Broad Street, Philadelphia, Pennsylvania.

6. Prior to December 25, 1985, when counsel failed to receive proof of service, counsel caused his office to communicate with Professional Filing Service and Michael Damiano to confirm whether service had been made, and counsel received back the oral message that proof of service would be shortly forthcoming.

7. Said process server submitted a bill on December 2, 1985, which states that said process, in the instant case and other cases "were served," including service of Complaint on Acme Markets, Inc., so that Counsel believed service had been made. See Exhibit 3. Said bill was paid by check, dated February 2, 1986. See Exhibit 3.

8. Counsel believed that the Defendant had been served, and that proof of service would be shortly forthcoming.

9. Prior to February 26, 1986, counsel made additional efforts to obtain proof of service on Defendant, by leaving messages at the office of said Professional Filing Service and Michael Damiano. When counsel failed to receive a response, the letter of February 26, 1986 was sent to said Professional Filing Service, Michael Damiano. Said letter is attached to Plaintiff's Answer to Defendant's Motion, Exhibit 4.

10. Subsequent to February 26, 1986, Michael Damiano called and advised counsel that proof of service would be provided shortly.

11. Subsequent thereto, counsel received a letter from the Clerk of the

Honorable Joseph McGlynn, advising that the records did not reflect service on the Defendant, Acme, Inc. See letter of April 1, 1986 of Beverly Bearman, Exhibit 6. Counsel advised said law clerk of the aforesaid problems, and inquired as to whether counsel could file a Motion to Withdraw Michael Damiano as the person authorized to make service and substitute himself. Counsel raised the question as to whether counsel could make service under the Rules. A motion to name counsel as the person to make service was subsequently filed, but was not granted. See Exhibit 7.

12. Counsel advised Damiano of the letter of April 1, 1986, Exhibit 6. Subsequently counsel received proof of service, Exhibit 8, showing service on April 23, 1986.

13. Defendant's counsel entered an

appearance on May 9, 1986. See Exhibit 5.

14. Subsequently, counsel was contacted by counsel for the Defendant, and agreed, by stipulation, for an extension of time for the Defendant to reply to the Complaint. Exhibit 9.

_____

HARVEY L. ANDERSON, ESQUIRE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF , 1986

_____

NOTARY PUBLIC

Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-594

In The
Supreme Court of the United States
October Term, 1987

SHELDON LOVELACE,

Petitioner,

v.

ACME MARKETS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether "good cause" for a plaintiff's failure to serve process upon a defendant with conspicious local offices within the 120-day period required by Federal Rule of Civil Procedure 4(j) is demonstrated where plaintiff unnecessarily engages a "process server" to effect service, receives no timely affidavit or proof of service, and makes no attempt to effect service by several available alternate methods.[1]

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[1] Acme Markets, Inc. is a wholly-owned subsidiary of American Superstores, Inc. Acme Markets, Inc. has no subsidiaries.

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STATUTE:

42 U.S.C. § 2000e (1982) 1

FEDERAL RULES OF CIVIL PROCEDURE:

Fed.R.Civ.P. 4, 28 U.S.C. ..... *passim*

Fed.R.Civ.P. 55(c), 28 U.S.C. 5

STATEMENT OF THE CASE

On October 29, 1985, Sheldon Lovelace ("Lovelace") filed a complaint against Acme Markets, Inc. ("Acme") in the United States District Court for the Eastern District of Pennsylvania.[2] Lovelace averred that Acme had discriminated against him in employment on account of race, and requested relief under Title VII[3] and various state law theories.

Lovelace's complaint reflected that he was a resident of Philadelphia and that Acme was a Pennsylvania corporation with its principal place of business in downtown Philadelphia.[4] The office of Lovelace's counsel was also in downtown Philadelphia.

On the day the complaint was filed, the Clerk of the District Court granted Lovelace's motion to appoint Michael Damiano ("Damiano") to serve the summons and complaint upon Acme.[5] Damiano was a "process server" whose office was located in the Philadelphia suburbs.[6]

On December 2, 1985, Damiano submitted a bill to plaintiff's counsel, indicating that service of the complaint had been made upon Acme.[7] On February 26, 1986, the 120th day after filing of the complaint, Lovelace's counsel

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2 J.A. 3. "J.A." refers to the Joint Appendix filed in the Court of Appeals.

3 42 U.S.C. § 2000e (1982).

4 J.A. 11.

5 J.A. 3.

6 J.A. 40.

7 J.A. 46.

sent a letter to Damiano requesting adequate proof that service of the complaint had been made.[8]

On April 1, 1986, Lovelace's counsel received a letter from the Clerk of the District Court.[9] This letter directed that service be made within fifteen days, and warned that if service was not made within that time "the Court will consider dismissal of the action or those portions of the action that the Court concludes should be dismissed under the circumstances."[10]

Service of the summons and complaint were actually made upon Acme on April 23, 1986.[11] Service thus occurred 175 days after the complaint had been filed and seven days after expiration of the deadline stated in the Clerk's April 1 letter.

Acme moved to dismiss Lovelace's complaint for failure to serve process within the 120-day period provided by Federal Rules of Civil Procedure 4(j).[12] Lovelace opposed the motion and contended that there was good cause for his failure to make service within the required 120-day period.[13]

On September 22, 1986, the District Court entered an Order granting Acme's motion and dismissing Lovelace's

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8 J.A. 48-49.

9 J.A. 52.

10 J.A. 52.

11 J.A. 54.

12 Fed.R.Civ.P. 4(j), 28 U.S.C. (1983).

13 J.A. 23.

complaint without prejudice.[14] The District Court concluded that the circumstances of the case did not demonstrate good cause for the tardy service.[15] On October 29, 1986, the District Court entered an order denying Lovelace's motion for reconsideration.[16]

Lovelace appealed the decision of the District Court. On May 29, 1987, the Court of Appeals affirmed the decision of the District Court.[17] The Court of Appeals concluded that Lovelace's reliance upon the representation of a specially-appointed process server that timely service had been made failed to establish good cause for untimely service, given that appointment of the process server had been unnecessary, that Lovelace and his counsel never received timely proof that service had actually occurred, and that they never utilized any of the alternate means that existed to insure timely service.[18]

The Court of Appeals denied Lovelace's motion for rehearing on July 13, 1987. Lovelace thereupon filed a petition for a writ of certiorari.

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REASONS FOR DENYING THE WRIT

This case raises the very narrow question of whether its decidedly peculiar facts constitute good cause for un-

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14 J.A. 3.

15 J.A. 71-75.

16 J.A. 3.

17 *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81 (3d Cir. 1987).

18 *Id.* at 83-84.

timely service of process. This question of interpretation of and inference from facts has been considered and decided twice—once by the District Court and again by the Court of Appeals. In each instance, the court below decided that good cause had not been shown. Notwithstanding the importance of the case to the parties, it does not raise any issue beyond the question of fact interpretation that has already been twice decided. This case does not present a procedural issue that can be expected to recur frequently, does not present or suggest any "conflict" among the Courts of Appeals, and does not present any question as to the propriety of the application of Rule 4 by the lower federal courts.

Under Rule 4(a), the responsibility for prompt service of process rests with the plaintiff or his counsel.[19] A plaintiff's options in fulfilling this responsibility are many. The rule expressly allows process to be served by anyone who is over eighteen years of age and not a party.[20] When the defendant to be served is a corporation, Rule 4 offers a variety of methods by which service can be made, ranging from mail directed to the defendant,[21] to personal service upon the corporation's office,[22] to service in person or by mail upon an agent designated for service of process.[23] If, despite all of these options, a plaintiff fails to effect service within 120 days after the filing of the com-

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19 Fed.R.Civ.P. 4(a), 28 U.S.C. (1983).

20 Fed.R.Civ.P. 4(c)(2)(A), 28 U.S.C. (1983).

21 Fed.R.Civ.P. 4(c)(2)(C)(ii), 28 U.S.C. (1983).

22 Fed.R.Civ.P. 4(d)(3), 28 U.S.C. (1983).

23 Fed.R.Civ.P. 4(d)(3), 28 U.S.C. (1983).

plaint and is unable to show good cause why service was not made within that period, the action must be dismissed.[24]

Here, Lovelace argues, as he did unsuccessfully to the District Court and the Court of Appeals, that the misstatement of his specially-appointed process server shows good cause for the failure to effect timely service by any other means. That badly misses the point in two ways.

First, it does not suggest any question calling for this Court's discretionary review. The issue of good cause turned and was decided upon the case's particular —and peculiar—facts. The Court has made clear that it does not grant certiorari to review facts.[25] Furthermore, there is no conflict between the Courts of Appeals as to whether facts such as these, or even a given quantum or variety of facts, establishes good cause. Any differences in the decisions of the Courts of Appeals reflect, instead, differences in assessment of facts of individual cases.[26] The grant of this petition would invite a flood of similar fact-based petitions. Were the Court to grant certiorari here to determine whether these facts show good cause for untimely service, other litigants would be encouraged to file petitions seeking review of a wide spectrum of fact-sensitive decisions.[27]

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24 Fed.R.Civ.P. 4(j) (1983).

25 *Texas v. Mead*, 465 U.S. 1041 (1984).

26 *Compare, e.g., Wei v. Hawaii*, 763 F.2d 370 (9th Cir. 1985), with the decision of the Court of Appeals here. *See also Geiger v. McClurg Court Assocs.*, No. 86-C-4419 (N.D. Ill., slip op. June 9, 1987).

27 Such decisions include, to cite but two examples, such things as whether a party has demonstrated "excusable neglect" in filing an untimely appeal, *Redfield v. Continental Cas. Co.*, 818 F.2d 596 (7th Cir. 1986), and whether a party has shown "good cause" for setting aside an entry of default. Fed.R.Civ.P. 55(c), 28 U.S.C. (1982).

Second, this case does not, as Lovelace believes, raise any question of unfairness in the application of Rule 4. Lovelace's argument that the misstatement of the specially-appointed process server explains the failure to make untimely service has a fatal logical flaw. There was no need at all for appointment of the process server in the first place.[28] Since Rule 4 did not require the appointment of the process server, no issue arises as to unfairness of enforcement of the 120-day time limit for service by that method. As the Court of Appeals recognized, this argument overlooks Lovelace's failure even to attempt service on this local defendant by any one of the several alternate methods available.[29] There is, therefore, no issue as to the fairness or the construction of Rule 4.

Instead, the question here, fully reviewed by the District Court and Court of Appeals, is whether these facts show good cause for untimely service. That is not a question appropriate for this Court's review.

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[28] In fact, this is not a case in which a special appointment to serve process was even appropriate. Rule 4(c)(2)(B) provides that a special appointment shall be made *"only"* on behalf of a party proceeding *in forma pauperis*, on behalf of a seaman, on behalf of the United States, or pursuant to an order providing that a special appointment is necessary for service to be promptly effected. Fed.R.Civ.P. 4(c)(2)(B), 28 U.S.C. (1983) (emphasis added).

[29] *Lovelace*, 820 F.2d at 85.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. 87-594

SHELDON LOVELACE,
Petitioner

vs.

ACME MARKETS, INC.,
Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The sole basis of opposing the Petition for Writ of Certiorari is the claim that the issue "does not raise any issue beyond the question of fact interpretation that has already been . . . decided." Brief in Opposition at page 4.

The instant case did not involve a dispute as to the historical or narrative facts. Indeed, those facts were established by counsel's affidavit. See Appendix, pp. A-21 to A-26. United States for Use and Benefit of DeLoss v. Kenner General Contractors, Inc., 764 F.2d 707, 709 (9th Cir. 1985); Woods v. Partenreederei M.S. Yankee Clipper, 112 F.R.D. 115 (D. Mass. 1986).

The dispute does not center over some application of discretion in a matter left to the court's discretion. Rather, the Court of Appeals for the Third Circuit eschewed any discretion, holding that reliance on a specially appointed process server was "misplaced" and "cannot be excused if the legislative intent for a strict interpretation of Fed. R. Civ. P. 4(a) is not to be rendered illusory." (Emphasis added). Appendix p. A-10. Thus, whatever inferences might be placed on the narrative facts, the legal result was dictated by the erroneous legal rule applied, and it is that erroneous legal rule which is subject to review. If the view of Rule 4(a) and (j) advanced by Petitioner in his Petition, and credited by the leading commentator (Siegel) on Rule 4 as the true legislative intent

of the drafters of Rule 4(a) and 4(j), is the correct construction of Rule 4(a) and (j), then reversal and remand are required to make the determination of "good cause" in accordance with that construction, stated by Siegel in Petitioner's Petition for Writ of Certiorari at pp. 11-12, 16-17, 20-21 thereof.

Any fact finding, or even exercise of discretion, based on an erroneous legal standard, cannot stand, and is subject to review. Tyler v. INA, 539 F.2d 1072 (5th Cir. 1976). There is plenary review of the trial court's choice and interpretation of legal precepts and its application of those legal precepts to the historical facts. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98 (3rd Cir. 1981). Erroneous conclusions of law may always be set

aside. Smith v. United States, 336 F.2d 165 (4th Cir. 1964); McLeod v. Local 459, AFL-CIO, 300 F.2d 237 (2d Cir. 1962); Robinson v. United States, 518 F.2d 1105 (9th Cir. 1975).

The critical reliance which the small law firm must place on the independent process server is illustrated by Baden v. Craig-Hallum, Inc., 115 F.R.D. 582 (D. Minn. 1987). Therein, the Court stated:

> "Plaintiff did make diligent efforts to serve Derksen. Plaintiff hired a process server who attempted to serve Derksen . . . ." 115 F.R.D. at 585.

In assessing due diligence in that case, the Court noted that Plaintiff's counsel employed a private legal process firm, and upon receiving a "not found" from the process server, tried mail service.[1] The Baden Court indicated that

"where Plaintiff has demonstrated some diligence and a reasonable effort to effect service" that he had shown "good cause for delay." 115 F.R.D. at 587.

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[1]In the instant case the private process server fraudently reported that service had been made, which lulled Plaintiff into the belief that no further efforts to make service were required. Cf. Ditkof v. Owen-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987); Jordan v. United States, 694 F.2d 833 (D.C. Cir. 1982).

No case has required, or even approved, the use of several methods to effectuate service simultaneously in the hopes that one or more would be effective. Such a rule would impose a serious hardship on the small practitioner, for no good purpose, and, in small cases, such as the instant one, (the EEOC limit on damages is two years salary) for a worker on a moderate salary would discourage the attorney from taking such cases.

The need for guidance in applying Rule 4(j) is well illustrated by the case of Gordon v. Hunt, 116 F.R.D. 313 (S.D. N.Y. 1987).[2] The Gordon Court stated the rule, thusly:

> "The first factor which courts have considered in determining whether good cause exists for service outside the 120-day limit is whether the delay in service was "the result of mere inadvertence," or whether there has been a "reasonable effort" to effect service. Geller v. Newell, 602 F.Supp. 501, 502 (S.D. N.Y. 1984).
>
> The second factor was considered in a Rule 41(b) motion to dismiss for failure to prosecute based on untimely service--prejudice to the defendant presents a more difficult question. Courts are divided on the issue whether lack of prejudice to the defendant should be considered as a factor in determining whether good cause exists for untimely service under the present Rule 4(j). At least one court has taken the position that because the amended Rule 4(j) on its

face does not require a showing of prejudice on the part of the moving party, a showing of prejudice is irrelevant to a determination of good cause for tardy service. See Quann, 112 F.R.D. at 661; . . . . However, other courts, including two in this circuit, have considered lack of prejudice as a pertinent factor in determining whether good cause exists. See e.g., United States v. Jack Cozza, Inc., 106 F.R.D. 264, 268 (S.D.N.Y. 1985); Geller v. Newell, 602 F.Supp. at 502; Peters v. E.W. Bliss Co., 100 F.R.D. 341, 348 (E.D. Pa. 1983). . . . . However, it would seem appropriate that a determination of "good cause," which is a

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[2]In Gordon dismissal was granted where:

> "[A]ccording to plaintiffs counsel's own account, no effort was made to serve Fustok in Korwek until February 1983, over a year after the action was filed. Because the Korwek plaintiffs made no efforts to serve Fustok within the 120-day

legal term traditionally broadly defined, should take into account an equitable consideration such as hardship--or lack thereof--to the defendant. Accordingly, any lack of prejudice will be considered a relevant factor here."

116 F.R.D. at 319, 321.

In the instant case no prejudice was ever claimed by Respondent, and prejudice, or lack thereof to Respondent, was not considered by either the District Court or the Court of Appeals.[3]

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[2]cont'd period, and have not explained their failure to do so, a determination of "good cause" for failure to effect timely service would be an abuse of discretion."

116 F.R.D. at 325.

[3]Petitioner also argued before the District Court and the Court of Appeals that this equitable factor of prejudice or lack thereof should be considered, citing United States for Use & Benefit of Arrow Electronics, Inc. v. G.H. Coffey

There was also a subsidiary question that was involved before the District Court and Court of Appeals, and raised by Respondent at p. 6 of its Brief in Opposition to the Petition for Writ of Certiorari as to whether Petitioner was bound to use the process server appointed by the District Court under Local Rule 29 (see P. 4 of the Petition for Writ of Certiorari), or even if not (as the Court of Appeals subsequently held in its Opinion, Appendix p. A-7), whether counsel might anticipate such a requirement and believe that service by another might be a nullity. Cf. Sieg v. Karnes, 693 F.2d

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[3]cont'd Co., Inc., 100 F.R.D. 413 (D. Me. 1983) (Delay of a few months excused); Moorehead v. Miller, 102 F.R.D. 834 (D. V.I. 1984). Indeed, in Thompson v. Ralston Purina Co., 599 F.Supp. 756 (W.D. Mich. 1984) failure to serve by a pro se plaintiff was excused on the basis

803 (8th Cir. 1982); compare Rule 4(c)(2)(A) and (B), and Rule 4(c)(3), Federal Rules of Civil Procedure (Local Rule 29,[4] in practice, had been used routinely, prior to the amendment to Rule 4, to provide service by retained private process servers, since the local Marshal's office did not have the staff to make such service; this practice of

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[3]cont'd that the employer had received the notice from the EEOC of the right to sue, so that the employer was aware of the claim. The respondent-employer in this case had also received such notice.

[4]The process server was specially appointed to make service by an Order issued by the Clerk of Court, pursuant to Rule 29 of the United States District Court for the Eastern District of Pennsylvania.

By letter of April 1, 1986, the District Court granted an extension of time until April 15, 1986, to

using Local Rule 29 continued after the

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[4]cont'd effectuate service. Although counsel requested that he be specially appointed to make service, the Court failed to appoint him. Counsel then advised the process server of the time limit in the letter of the Court, and the process server agreed that he would make service on or before that date.

The process server did not make service by that date, but did make service on April 23, 1986, eight days after the date specified in the letter of the Court.

At the time counsel requested his own appointment as process server, it was not at all clear whether, as the Court of Appeals has now decided, that once a process server was appointed someone else could make service. See Burroughs Corp. v. Carsan Leasing Co., 99 F.R.D. 528 (D. N.J. 1983); Heritage House Frame & Moulding Co., Inc. v. Boyce Highlands Furniture Co., Inc., 88 F.R.D. 172 (D. N.Y. 1980), and compare Fleeger v. Clarkson Co., Ltd., 86 F.R.D. 388 (D. Tex. 1980). Service by an unauthorized person would be a nullity. Sieg v. Karnes, 693 F.2d 803 (8th Cir. 1982).

Further, even if counsel were, under the facts of this case, required to personally make the service, he would have to consider that such service would be likely challenged.

amendment to Rule 4).

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[4]cont'd Jugolinija v. Blue Heaven Mills, Inc., 115 F.R.D. 13 (S.D. Ga. 1986)(Court in upholding service by attorney noted that "it may be that allowing for service of a summons and complaint by a party's attorney is inappropriate or undesirable in certain respects," but upheld the service in the "absence of authority."); contra, In re Evanishyn, 1 F.R.D. 202 (D.N.Y. 1939)(Counsel may not make service).

Thus, if counsel's actions are reasonable, even if he acted on what turned out to be an erroneous interpretation of the law, his actions should not be deemed "unreasonable" in retrospect.

Finally, even as to the eight day late service, the omission and misconduct of the process server is involved.

If the District Court had applied the construction of Rule 4(a) and (j) advocated by Petitioner as the correct construction, it would have had to evaluate the fraud and misconduct, and could have excused all or a substantial part of the initial 120 day period, giving a corresponding additional period which would have likely included the period when actual service was made. In the alternative, the District Court could have concluded that the short eight day period beyond the additional 15 day period should be excused. In addition, the

Since the sole issue upon which review is sought in this Honorable Court is the question of the construction of Rule 4(a) and (j), Federal Rules of Civil Procedure, as to whether "good cause" under Rule 4(j) may include the fraud of the process server, and whether Rule 4(a) makes an independent process server a plaintiff's agent, such that the fraud or omission of the process server cannot legally constitute "good cause," the subsidiary, background questions about the existence and application of Local Rule 29, need not be addressed. The legal basis for the

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[4]cont'd total lack of prejudice to Respondent could have been considered by the District Court in determining whether, in light of the conduct of the process server, the short time periods involved herein, considered with Petitioner's good faith efforts to effectuate prompt service, should be good cause to excuse service made within

decision of both the District Court and the Court of Appeals was that Rule 4(a) and (j) mandated that a plaintiff was required to "ensure" service within 120 days, so that the fraud and omissions of the process server employed by plaintiff did not constitute "good cause," legally, to excuse late service, whether or not there was any prejudice suffered by the defendant.

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[4]cont'd 175 days. (55 over the 120 day period, so that an excuse for 55 days only would be render service timely, or only eight days beyond the extension, so that an excuse of eight days would suffice).

Even if the District Court could have concluded that service was not timely made under a correct application of Rule 4(a) and (j), if it reached that result on the basis of an application of an erroneous rule, reversal is required and the District Court should apply the correct rule.

If the construction of Rule 4(a) and (j) made by the Court of Appeals and District Court is erroneous, as Petitioner urges (pp. 9-25 of the Petition for Writ of Certiorari), then certiorari should be granted, the dismissal of Petitioner's suit should be reversed, and the case remanded. If, on application of the correct legal standard, there is any remaining viability to the motion to dismiss, the District Court, in the first instance, would review the case and determine the question in the light of the correct legal standard.

Because there is no consensus within the Circuits as to what construction should be placed on Rule 4(a) and (j), Federal Rules of Civil Procedure, and because there is respectable authority that the construction of Rule 4(a) and (j) made by the Court of Appeals for the

Third Circuit is erroneous, and not consonant with the intent of the authors of the amendment to Rule 4(a) and (j), and this Honorable Court is the only authority which can resolve this question of construction, this Honorable Court should grant certiorari, and decide the narrow legal question presented for review.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 1987, three true and correct copies of Petitioner's Reply Brief to Respondent's Brief in Opposition to the Petition for Writ of Certiorari were served by depositing the same with the United States Post Office, First Class Mail, Postage Prepaid, addressed to Respondent's attorney of record, Herbert G. Keene, Jr., Esquire, Stradley, Ronon, Stevens & Young, 1100 One Franklin Plaza, Philadelphia, Pennsylvania 19102.

I further certify that all parties required to be served have been served.

Harvey Lee Anderson

HARVEY LEE ANDERSON
Attorney for Petitioner